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Supreme Court, U.S.
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No. 95-1414

In The

Supreme Court of the United States

October Term, 1995

APACHE CORPORATION,

Petitioner,

v.

LEO MOORE, DAISY MOORE, AND BESS COLE,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the imposition of $1,500,000 in punitive damages against a company whose gross negligence caused what is believed to be the largest gas well blowout in United States history violates the Due Process Clause of the Fourteenth Amendment.

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FOREWORD

Respondents will refer to the Petitioner, Apache Corporation, as "Apache", and will refer to the Respondents, Leo Moore, Daisy Moore, and Bess Cole, in the plural, as simply the "Moore Group." The members of the Moore Group were intervenor-plaintiffs in the trial court, and Apache was a defendant.

References to the statement of facts of the trial court proceedings will use the notation "S.F. ___."[1] References to the trial court transcript will use the notation "Tr. ___." Because the Moore Group were plaintiffs in the trial court, references to the Moore Group's trial exhibits will use the notation "P. Ex. ___." Finally, references to Apache's Petition For a Writ of Certiorari ("Petition") will use the notation "Pet. ___", and references to the Appendix to such Petition will use the notation "Pet. App. ___."

Daisy Moore represented herself at trial. Her husband, Leo Moore, and her sister-in-law, Bess Cole, were represented at trial by the undersigned counsel for the Moore Group. This Brief in Opposition to Apache's Petition is filed on behalf of all three members of the Moore Group.

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[1] In Texas, the record of the oral proceedings (witness testimony, oral motions and argument, etc.) before the trial court is referred to as the "Statement of Facts". Selected written documents (pleadings, written motions, jury charge, verdict, judgment, etc.) involved in the trial comprise the "Transcript".

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISION INVOLVED

The Moore Group adopts the sections of Apache's Petition entitled "Opinions Below",[2] "Jurisdiction", and "Constitutional Provision Involved". However, virtually every paragraph of the section of Apache's Petition entitled "Statement" contains inaccuracies and material omissions that make the Statement more of a jury argument than an accurate summary of the evidence. The Moore Group therefore presents its own "Statement of the Case."

STATEMENT OF THE CASE

The Key 1-11 well, located in Wheeler County, in north Texas, blew out on October 4, 1981. S.F. 2765. Apache was the operator of the well and was also a working interest owner in the well. The Moore Group were royalty interest owners on tracts adjoining section 11, where the well was located. The Moore Group's claim was that Apache's negligence and gross negligence in the drilling, completion and monitoring of the well caused the well to blow out, resulting in drainage of gas from the tracts in which the Moore Group owned interests.[3] Tr. 13.

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[2] The Moore Group would point out, however, that there should be a line break immediately before the name "Paul Douglas Storts" on page 10a of Appendix A to Apache's Petition.

[3] At trial, there were eight plaintiffs: Tom L. Scott, Inc., George S. Johnson, Sunshine Exploration Company, W. W. Braden, III, and Canyon Energy, Inc. (collectively, the "Scott Group"), as well as the three members of the Moore Group. All

After a trial lasting over a month and a half, including three days of jury deliberations, the jury returned a verdict finding Apache liable for conversion and gross negligence. The jury awarded the eight plaintiffs $191,713 in actual damages for conversion, $81,282 in actual damages for gross negligence, and $4,500,000 in punitive damages (an amount later reduced as discussed below). Pet. App. 38a-43a.

Apache settled with the Scott Group after verdict but before entry of judgment. Following that settlement, the trial court entered judgment for the Moore Group, based on the jury verdict, for $10,835 in actual damages for gross negligence and $1,687,500 in punitive damages. Pet. App. 37a-44a. On appeal, the Texas Court of Appeals reduced the punitive damages awarded to the Moore Group to $1,500,000 (Pet. App. 33a-34a) but otherwise affirmed the trial court's judgment. Pet. App. 35a. The Texas Supreme Court denied Apache's Application for a Writ of Error. Pet. App. 45a-48a.

According to Apache, an unreasonable jury "fined" Apache (Pet. 12) $4,500,000 in exemplary damages based upon "days and days of highly inflammatory testimony" concerning gifts from contractors to Apache employees of money, cars, alcohol, drugs and prostitutes. Pet. 6-7. Apache claims that in awarding exemplary damages, the jury sought to punish Apache, even though "[t]here was not a stitch of evidence that Apache management authorized the employees to perform their jobs improperly", there is "no support for the proposition that, prior to the

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plaintiffs except Daisy Moore were represented at trial by counsel for Respondents here. Ms. Moore represented herself *pro se*.

blowout, Apache management had 'actual knowledge' of the existence of the kickback practices", and "there can be no question that management neither participated in that scheme nor approved it once it learned of it." Pet. 8, 15. According to Apache, there was "no evidence whatever" that the conduct of any of its employees connected with the well "was impacted by his having accepted kickbacks", and any evidence of kickbacks "had only the most attenuated and speculative connection to the blowout." Pet. 7. In Apache's view, the well was in fact drilled, completed and managed in accordance with industry custom. Pet. 2, 4, 12. The jury simply ignored all of the evidence that Apache acted properly, choosing instead to focus on conduct that amounted at most to "an isolated instance of inattentiveness and/or bad judgment by low-level employees." Pet. 3-4, 12-15. In short, Apache contends that this is a "classic case of punishing the victim" rather than the perpetrator. Pet. 1.

These themes, which are interwoven throughout Apache's Petition, ignore and are inconsistent with the evidence. As will be seen below, the jury's verdict was fully supported by the evidence, and the opinion of the Texas Court of Appeals is correct.

The Key 1-11 well was a deep, high pressure gas well that extended more than sixteen thousand feet (three miles) underground. S.F. 1345-1346. When the well blew out, the force of the blowout launched the wellhead and tubulars eighty feet into the air. S.F. 1586. The well blew out for 16 months. From October 4, 1981, until June, 1982, the gas escaping from the well bore was vented into the atmosphere. From June, 1982, until the blowout was extinguished, Apache managed to capture the escaping gas into a pipeline and sell it. S.F. 2177. Apache was

finally able to "kill" the well and extinguish the blowout in February, 1983. S.F. 2582.

In terms of gas lost, the blowout may be the largest blowout of a gas well in United States history. Pet. App. 4a. From October 4, 1981, until the blowout was killed in February, 1983, 14.3 billion cubic feet of gas were drained from the reservoir, much of which came from portions of the reservoir other than section 11, the section in which the Key 1-11 well was located. S.F. 2052. The total value of the gas vented into the atmosphere from October, 1981 to June, 1982, was approximately $69,000,000. S.F. 3915. In addition, Apache was paid high prices, totaling approximately $41,000,000, for the gas that Apache was able to capture and sell from June, 1982, until February, 1983. S.F. 2177.

Following the blowout, numerous royalty owners from section 11 (on which the well was located) and mineral interest owners from surrounding tracts connected to the common underground natural gas reservoir filed claims against Apache and its co-working interest owner, El Paso Exploration Company ("El Paso"), now known as Meridian Oil Production, Inc. Apache and El Paso in turn filed claims against various suppliers and contractors on the well, including Axelson, Inc. ("Axelson"), the supplier of a casing relief valve installed on the well by Apache after Apache realized that the well had problems. Tr. 415; S.F. 1575. By the time the case was called to trial, the only remaining parties were the eight plaintiffs mentioned above, who were royalty owners on adjoining tracts, and Apache, El Paso, and Axelson. Apache and El Paso settled with Axelson at the completion of *voir dire* examination of the jury panel. S.F. 7-8.

The case then proceeded to trial with the eight plaintiffs asserting their claims against Apache.

The evidence in this case is voluminous. In order to understand it and its relevance to the "Reasons for Granting the Petition" set forth by Apache in its Petition, it is necessary to understand the way in which the well was constructed. First, 20 inch (in diameter) conductor pipe was inserted into the ground, from the surface to a depth of approximately 100 feet. S.F. 1417. Next, $10^{3}/_{4}$ inch surface casing was inserted ("run") inside the conductor pipe to a depth of 5,200 feet. S.F. 1368. A string of $7^{5}/_{8}$-inch "intermediate" casing was then run inside the conductor pipe and surface casing, from the surface to a depth of 15,850 feet. S.F. 1404. A string of five inch pipe called a "liner" was then hung, with the top of it attached to the lower part of the intermediate casing, from a depth of 15,514 to 16,288 feet. S.F. 1404. Finally, to bring the gas to the surface, a string of $2^{7}/_{8}$-inch production tubing ran from the surface down to within a few feet of the bottom of the well. S.F. 1418. The space between the $2^{7}/_{8}$-inch production tubing and the $7^{5}/_{8}$-inch intermediate casing is called the "tubing-casing annulus" (the "annulus"). S.F. 1413. "Pressure on the backside" refers to unexpected pressure inside the annulus, on the "backside", (*i.e.*, outside) of the $2^{7}/_{8}$-inch production tubing, exerting force outward against the intermediate casing. Both sides' liability experts agreed that the event that precipitated the blowout was the rupture of the $7^{5}/_{8}$-inch intermediate casing (S.F. 1586; 2621-2622), and that the intermediate casing ruptured due to excessive pressure on the backside. S.F. 1586; 2623.

As operator of the well, it was Apache's responsibility to drill and complete the well. Ratliff Drilling

Company ("Ratliff"), which was hired by Apache to help drill the well, was to take instructions from Apache in every phase of the well's construction. S.F. 655. Ralph Walker, Apache's drilling superintendent, took charge of the well and issued instructions to Ratliff on a "need-to-know" basis. S.F. 663. Mr. Walker often ran the drilling rig (S.F. 676) and loaded all strings of casing in the well. S.F. 680. He also selected the vendors who supplied goods and services to the well. S.F. 678. Mr. Al Perlin, Apache's general counsel at the time of the blowout, testified that with respect to the safe and proper drilling and completion of the well, the buck stopped with Apache. S.F. 1208.

Even before drilling operations on the well began, Apache took shortcuts and made decisions that adversely affected the well. For example, Apache failed to do a comprehensive well plan for the well. S.F. 1454. Apache then placed Mr. Gordon Clower on the well as Apache's drilling foreman, or "company man." S.F. 2452-2453. It was Mr. Clower's responsibility to supervise Ratliff and make sure that the well was properly drilled. S.F. 199-200. However, because he had a serious drinking problem, Mr. Clower was passed out and incoherent on the well while he was in charge of it. S.F. 25-26; 142-144. Mr. Clower's alcoholism was well known to Apache's regional office that was in charge of the well. S.F. 25-26.

Once drilling operations began, Apache's actions and failures to act continually led to problems with the well. By way of example, as the drill string was being brought out of the hole after cementing the five-inch liner in place at the bottom of the well, Apache failed to see to it that the void left in the hole by the removal of the drill string was filled with drilling mud. This caused the well to "kick", *i.e.*, to begin to flow. S.F. 1485-1489; 1492-1493.

When the kick occurred, Gordon Clower, whom Apache had put in charge of supervising the well, was "missing" from the well site. S.F. 1493. During the kick, thousands of feet of cement were sucked up into the intermediate casing, where the cement hardened. S.F. 2206-2209. This cement then had to be drilled out of the intermediate casing, which cut into the casing and weakened its walls.[4] S.F. 1495-1496; 3992. Despite the damage to the intermediate casing from drilling thousands of feet of cement out of it, Apache ran no logs or tests of any kind to determine the extent of damage to the casing caused by either the kick or by the subsequent drilling out of cement. S.F. 1496-1497; 2212-2214.

After the well was drilled, it was perforated.[5] Almost immediately after perforation, Apache became aware of a pressure leak at the surface. S.F. 1532-1533. Apache realized that this leak meant that there was subsurface pressure on the backside, placing the intermediate casing under stress. S.F. 1528. Mr. Ralph Walker, Apache's drilling superintendent, knew that the source and significance of the leak could not be discovered unless the tubulars were pulled so the leak could be identified and repaired. S.F. 749; 2303. Mr. Walker informed his supervisor, Mr. Loyd Somers, of the buildup of pressure on the backside (S.F. 2218), and recommended that Apache pull the tubing and repair the leak. S.F. 2301-02. Mr. Somers

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[4] This was the casing that all experts agreed eventually failed, causing the blowout. S.F. 1586; 2621-2622.

[5] "Perforation" of a gas well refers to making holes in the casing and cement (if present) to allow natural gas to enter the well. It is usually done by means of a special type of gun lowered into the hole.

was operations manager and chief engineer for Apache in its Tulsa, Oklahoma regional office. S.F. 1584; 2735. However, rather than diagnose and repair the leak, Apache made the decision to complete the well with pressure on the backside. S.F. 1589-1590; 1592; 2239-2241. Incredibly, Apache even perforated the well a second time, thereby *increasing* the pressure against the weakened intermediate casing. S.F. 1521; 1525-1526.

After completing the well, Apache shut in the well in July, 1981, to await connection to a pipeline, and installed an Axelson pressure relief system at the surface of the well near the wellhead. S.F. 2234; 2242. The Axelson system was Apache's substitute for pulling the tubulars, diagnosing and repairing the subsurface pressure buildup. S.F. 1533-1534. The Axelson system was designed to bleed off and relieve the pressure on the backside when the pressure built up to a certain level. S.F. 1534-1535. Apache set the Axelson system to relieve the pressure when it reached 7,000 pounds per square inch ("psi"). S.F. 2237.

The Axelson system required a source of power (pressure) in order to operate. Without power, it was useless. S.F. 1538. Initially, Apache hooked the Axelson system up to pressure supplied by the drilling or completion rig. S.F. 1538. Apache then pressured the Axelson system by tapping into the subsurface pressure on the backside. S.F. 1538; 1542. However, several months before the blowout, Apache changed to bottled nitrogen as a power source for the Axelson system. S.F. 1550. Bottled nitrogen was the power source for the Axelson system at the time of the blowout. S.F. 1552. The nitrogen bottle was

lying on the ground near the wellhead, and was supposed to have been connected to the Axelson system by stainless steel tubing. S.F. 1562; 1790.

After installing the Axelson pressure relief system on the well, Apache delegated the all-important task of monitoring the well and the Axelson system to Mr. Terry Tate, Apache's production foreman. S.F. 392. It was Mr. Tate's job to carry out Apache's responsibility to monitor the well and the Axelson equipment, from July, 1981, until mid-September 1981. S.F. 393. However, Mr. Tate testified that he "had a lot of other things to do." S.F. 393. In fact, he did: "Terry Tate was on the take. Terry Tate was on the drugs. Terry Tate was on the whores. Terry Tate was on anything that he wanted to be on." S.F. 72. Apache's own outside trial counsel wrote to Mr. Al Perlin, general counsel of Apache, that "Terry Tate's malfeasance is particularly harmful, since Terry was in charge of the Key well while it was shut-in and when it blew out." P. Ex. 61-B. In the words of Apache's outside counsel, Apache had "sorry employees" in the field. P. Ex. 61-B.

From mid-September, 1981, until the well blew out on October 4, 1981, Apache assigned its responsibility to monitor the well and the Axelson pressure relief system to Mr. Tom Reames, an Apache "pumper." S.F. 393-394. Apache's theory of the blowout, articulated by its experts, was that the inside of the Axelson system contained aluminum tubing and brass fittings; that aluminum and brass are corrosive and should not have been used by Axelson; that the aluminum tubing inside the Axelson system corroded, resulting in small holes in the aluminum tubing; and that these holes allowed the nitrogen in the nitrogen bottle that was supplying operating power to the Axelson system to bleed dry at least one

week before the blowout, thus eliminating the power source to the Axelson system and rendering it inoperative to relieve the subsurface pressure buildup on the backside. S.F. 2855-2856; 3094; 3155-3156. In the opinion of Apache's experts, during the week or two immediately prior to the blowout, while the Axelson system was thus powerless to operate and relieve pressure, pressure on the backside slowly built up to over 10,000 psi, which caused the 7⅝-inch intermediate casing to rupture. S.F. 2844.

Dr. Ken Sorenson was one of Apache's primary liability experts. Dr. Sorenson acknowledged that the nitrogen bottle that was allegedly bled dry due to the holes in the aluminum tubing inside the Axelson system had a pressure gauge on it. S.F. 3169. Dr. Sorenson further acknowledged that it would have been possible to tell whether the nitrogen bottle had any nitrogen in it to power the Axelson system by simply looking at the pressure gauge on the bottle. S.F. 3169. Thus, if Mr. Reames, who was assigned by Apache to carry out Apache's responsibility to monitor the well during the three weeks preceding the blowout, had simply checked the gauge on the nitrogen bottle, he would have seen that the bottle was empty, and the blowout would have been prevented. Mr. Robert Grace, Apache's lead expert, testified on cross-examination that checking the gauge on the nitrogen bottle was very important. S.F. 2790-91. He was then asked whether he had reviewed the deposition testimony of Mr. Reames concerning whether Mr. Reames ever checked the gauge on the nitrogen bottle prior to the blowout. S.F. 2792. Incredibly, Mr. Grace testified that he did not "specifically recall any testimony in that regard." S.F. 2792. Dr. Sorenson testified essentially the same way.

S.F. 3170-71. However, Mr. Reames' deposition revealed that (i) he had no training by Apache in the use or maintenance of a casing relief valve (S.F. 3248); (ii) he never checked on the Axelson casing relief valve (S.F. 3249); (iii) all he was told by Apache to do was to simply go by the well site to make sure nothing had been stolen and to make sure things looked okay (S.F. 3247, 3249); and (iv) *he never checked the gauge on the nitrogen bottle*. S.F. 3241, 3245.

If it was important to check the gauge on the nitrogen bottle (as confirmed by Apache's own experts), it was doubly important to make sure that the nitrogen bottle was hooked up to the Axelson relief valve. The nitrogen bottle supplied power to the Axelson valve through a piece of stainless steel tubing running from the tip of the nitrogen bottle to the Axelson equipment. S.F. 1543-1544. The Axelson valve was powerless to relieve the pressure buildup on the backside unless it was hooked up. S.F. 1552.

Asked on cross-examination whether the nitrogen bottle was hooked up to the Axelson equipment prior to the blowout, Mr. Grace testified that it was, and further testified that the basis of his opinion was his review of the deposition of Ralph Walker (Apache's superintendent). S.F. 2778. Mr. Grace testified that someone as "trained and experienced" as Mr. Walker would have noticed if the nitrogen bottle had not been hooked up. S.F. 2778. In Mr. Grace's opinion, Mr. Walker could be relied upon. S.F. 2779-80. Dr. Sorenson also testified that the nitrogen bottle was hooked up, similarly relying on Mr. Walker. S.F. 3164. Yet, Mr. Walker, who was called by Respondents by deposition after the completion of

Respondents' cross-examination of Mr. Grace and Dr. Sorenson, testified as follows:

> Q. In your opinion, was the nitrogen bottle on that well hooked up to that stainless steel tubing at the time of that blowout or not?
>
> A. From looking at the end of the steel tubing that was supposed to have been hooked up to the bottle, I can't see any earthly way it could have been hooked up.

S.F. 3994.

Apache knew that the well had pressure on the backside, placing the intermediate casing under stress, almost immediately after Apache perforated the well. Instead of fixing the leak, Apache decided to install a pressure relief system. Apache's own experts testified that the blowout occurred because the pressure relief system failed to relieve the pressure on the backside, which slowly built up to at least 10,000 psi a week or two before the blowout and remained there until the blowout occurred. This pressure exceeded or was close to the burst rating of the 7⅝-inch intermediate casing (S.F. 2844), the critical tubular string in the well that broke first, precipitating the blowout. According to Apache, the Axelson system failed to relieve this pressure because although it was set to relieve pressure at 7,000 psi, the aluminum tubing inside the Axelson system had corroded, allowing the nitrogen in the nitrogen bottle to escape. Apache, as operator, had exclusive responsibility for monitoring the well and the pressure relief system. S.F. 1570. Yet, Apache never even checked the gauge on the nitrogen bottle to see whether nitrogen had escaped. Moreover, Ralph Walker, Apache's own superintendent, believed that the nitrogen bottle was not even hooked up. As a result, the blowout

occurred, billions of cubic feet of gas were lost into the atmosphere of the Texas panhandle, and lengthy and costly litigation ensued, with Apache still denying any responsibility for the blowout.[6]

The evidence at trial disclosed numerous instances of the acceptance of kickbacks and the use of drugs, prostitutes and alcohol by Apache employees. Apache claims that no causal relationship exists between those activities and the blowout and that in fact, these activities have no relevance to the Moore Group's case. Pet. 7. However, Mr. Perlin (Apache's general counsel) testified that kickbacks hurt the performance of Apache employees. S.F. 1317. Mr. Stephen Friot, a lawyer for Apache in another case involving the same type of activities, testified that such activities unquestionably undermined the quality of work of Apache's employees. S.F. 98; 104. This testimony is hardly surprising. To the contrary, the reasoning is obvious. As stated by Apache itself in an internal company memorandum:

> Companies making illegal payments would not inspect equipment as often. A foreman or supervisor [of Apache] who is on the take from this

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[6] Respondents, who are now elderly, waited until almost eleven years after the blowout to go to trial, due mostly to costly and obstructionist discovery tactics employed by Apache. *See Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556 (Tex. 1990), in which the Texas Supreme Court found Apache's attempts to buy the silence of expert witnesses adverse to Apache to be an "offensive and unacceptable use of discovery mechanisms", akin to "auctioning off a witness' testimony to the highest bidder", constituting a transparent violation by Apache of "the clear purpose and policy underlying the rules of discovery." 798 S.W.2d at 560.

> company would not be in a position to complain if a tool failed.

P. Ex. 50.

For the important job of inspecting the 7⅝-inch intermediate casing before it was installed in the Key 1-11 well, Apache chose White Stripe Inspection Company. S.F. 1505. Mr. Danny Merz, president of White Stripe, testified that White Stripe repeatedly furnished kickbacks, drugs and prostitutes to Apache's employees on the well prior to the blowout. S.F. 130; 152; 157-158; 182-183. Not surprisingly, White Stripe failed to inspect the intermediate casing before it went into the well. S.F. 381-382. Companies providing kickbacks, drugs, etc. could get away without performing their jobs because Apache employees accepting such gratuities were in no position to complain. S.F. 1209-1222; 1235-1236.

The Key well was "spudded"[7] in January, 1981, and was completed in July, 1981. S.F. 1475; 1528. Remarkably, Apache's regional headquarters in Tulsa, Oklahoma, was put on notice in June, 1980, that White Stripe was providing kickbacks to Apache employees. P. Ex. 65; S.F. 1587-1588. However, Apache turned right back around six months later and retained White Stripe to inspect (or in this case, fail to inspect) the 7⅝-inch intermediate casing that went into the well. S.F. 1316-1317.

Kickbacks were not the only thing that affected Apache's job performance. Mr. Wayne Eller was an Apache drilling foreman who worked on the well prior to the blowout. S.F. 42-44; 62. Mr. Eller testified that prior to

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[7] A gas well is "spudded" when the drillers first bore into the earth.

the blowout, while the well was being completed by Apache, if you wanted kickbacks you got kickbacks, if you wanted cars, you got cars, if you wanted prostitutes, you got prostitutes, if you wanted whiskey, you got whiskey, and if you wanted a new house, you got a new house. S.F. 68-69. The "benefits" that were passed around on the well prior to the blowout took the form of cocaine, double-x rated "skin flicks" and prostitutes on location. S.F. 69. Asked if his own performance was influenced by such things, Mr. Eller responded yes, that he "always worked better with a nose full of coke." S.F. 70.

Mr. Donnie Snapp was another Apache employee. S.F. 2437. He was a drilling foreman. S.F. 2448. He was hired by Apache in January, 1981 (S.F. 2448) (the same month that drilling commenced on the Key 1-11 well), and worked out of Apache's Elk City office (the office that was responsible for the Key 1-11 well) (S.F. 2449). When asked about instances of kickbacks, drugs and prostitution on the Key well prior to the blowout and their effect on the well, he repeatedly invoked his Fifth Amendment rights. S.F. 2469-2496.

Apache claims that its conduct was unknown to its management. Pet. 8, 15. However, Apache's own investigators concluded that Apache's regional office in Tulsa, Oklahoma was actively involved. P. Ex. 59. Apache claims that it "ferreted out the kickback scandal . . . , fired the involved employees, and cooperated fully with law enforcement authorities." Pet. 7. However, Apache has never offered any evidence that it ever attempted to clean house at any time prior to the blowout. To the contrary, the evidence is clear that Apache sought to clean house only after numerous lawsuits had been filed against it, in an attempt to cast itself in the best light possible in the

litigation. Apache's own in-house documents in fact reveal that as late as April 22, 1983 (over a year and a half after the blowout), Apache had neither realistic policies to deter or prevent the types of activities complained about, nor minimum safety and training standards. P. Exs. 52 & 53.

REASONS FOR DENYING THE PETITION

In light of the facts set forth above, there is a "reasonable relationship between the punitive damages award and the harm likely to result from [Apache's] conduct as well as the harm that has actually occurred." *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2721 (1993). Moreover, as is apparent from the evidence recounted above and in the Texas Court of Appeals' opinion (Pet. App. 1a *et seq.*), and as will be seen below, this case involves an isolated instance of egregious behavior, decided under Texas law that no longer exists.

1. The Texas common law rules that provided the basis for the imposition of punitive damages against Apache are no longer used in Texas.

Effective September 1, 1995, Texas enacted a new comprehensive statutory scheme for the imposition of punitive damages, covering, *inter alia*, standards for recovery, evidence, burden of proof, jury instructions[8],

[8] The Texas Court of Appeals correctly held that Apache waived its right to complain about the constitutionality of the jury instructions in this case by failing to object with specificity to such instructions, as required by Texas law. Pet. App. 25a-27a.

procedures for appellate review, and a limitation (or "cap") on the amount that can be awarded. A copy of these statutes is attached hereto as an Appendix. Accordingly, this case presents a punitive damages award imposed under a set of rules no longer used in Texas.

2. The facts of the *BMW* case are dramatically different from the facts of this case.

Apache argues that the facts of *BMW of North America, Inc. v. Gore*, No. 94-896, closely parallel the facts present here. Apache further indicates that it intends to raise arguments similar to those that have been raised in the *BMW* case. Apache suggests that the Court should therefore hold this case for disposition following its decision in *BMW*. Pet. 9-10. Without repeating all of the factual evidence discussed above, it is simply absurd to equate a case involving the concealment of minor damage to a car's paint job with a case involving a company whose drilling, completion, and monitoring practices were grossly negligent and whose management tolerated kickbacks, drugs, alcohol, and prostitution on the job, all of which led to one of the largest gas well blowouts in United States history. As a result, if the Court were to remand this case for further proceedings in light of *BMW*, the Moore Group respectfully suggests that it is likely that this case would quickly come back to this Court, simply because the evidence against Apache is overwhelmingly more egregious than the evidence against BMW.

3. The judgment in this case reflects a reasonable relationship between the punitive damages award and the harm likely to result from Apache's conduct as well as the harm that has actually occurred.

Apache argues that the ratio between punitive damages and actual damages, which it calculates to be 138:1 (Pet. 10), cannot be justified by the small award of actual damages found by the jury, particularly in light of an alleged lack of "potential harm," such as that considered by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), and by the Eighth Circuit in *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995). Pet. 10-11. Apache's analysis is flawed in several respects.

First, the ratio of 138:1, which Apache derives by dividing the $1,500,000 in punitive damages awarded to the Moore Group (as reduced by the Texas Court of Appeals) by the $10,835 in actual damages awarded to the Moore Group, is the result of sleight of hand. The jury awarded punitive damages and actual damages to both the Scott Group and the Moore Group. Apache then chose to pay off the Scott Group in a post-verdict settlement before judgment was entered. Members of the Scott Group, for the most part, were awarded higher actual damages by the jury than members of the Moore Group. The jury made a single punitive damages award, however, and allocated it equally to each of the eight plaintiffs. By entering into a post-verdict settlement with the members of the Scott Group, whose ratios of punitive damages were lower than members of the Moore Group, Apache bootstrapped itself into a higher ratio of punitive to actual damages in preparation for appeal. The proper ratio of punitive to actual damages is actually 23:1

($4,500,000 ÷ $191,713)[9], or at most 55:1 ($4,500,000 ÷ $81,282)[10]. Pet. App. 39a-43a. Even these ratios are too high, because they fail to take into account the subsequent reduction in punitive damages made by the Texas Court of Appeals. Apache cannot be allowed to ignore its selective settlement with some plaintiffs in order to artificially raise the punitive to actual damages ratio for the remaining plaintiffs.

More importantly, Apache's conceptual approach to the "disproportionality" issue is fundamentally incorrect. This Court has held that there should be a "reasonable relationship between the punitive damages award and the harm likely to result from [Apache's] conduct as well as the harm that has actually occurred." *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2721 (1993). It is therefore necessary to examine both the potential harm likely to result from Apache's gross negligence *and* the actual harm suffered.

With regard to potential harm, Apache admits that one of its employees, Tom Reames, was supposed to visit the well each day. Pet. 5. Had Mr. Reames been present when the well blew out, he might have been seriously injured or even killed. It would be perverse to allow Apache to take advantage of the fact that Mr. Reames was not doing his job, *i.e.*, by claiming that there was no potential harm resulting from Apache's gross negligence because Mr. Reames was not showing up each day to monitor the well. Furthermore, when it blew out, it was

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[9] $191,713 is the amount awarded by the jury to the eight plaintiffs for conversion. *See infra* at 2.

[10] $81,882 was awarded by the jury to all eight plaintiffs for gross negligence. *See infra* at 2.

shut in waiting for connection to a pipeline. If the well had blown out while being connected to the pipeline or thereafter, a major disaster would have occurred.

The "reasonable relationship" inquiry also focuses on the actual harm resulting from Apache's gross negligence. However, in discussing actual harm, Apache focuses narrowly on the actual damages awarded by the jury to the Moore Group and ignores the settlements that Apache entered into prior to judgment. Clearly, if the *potential* harm to other parties is factored into the reasonable relationship equation, so too is the *actual* harm which they suffer. *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2721 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S. Ct. 1032, 1045 (1991). With this in mind, the Texas Supreme Court summarized the "big picture" surrounding this litigation:

> This case arose from the October 1981 blowout of Key Well 1-11 in Wheeler County. In terms of the gas loss, this is believed to be the largest gas well blowout in United States history. It was not brought under control for over a year. Apache Corporation operated the well and, along with El Paso Exploration Company (now known as Meridian Oil Production Company), owned the working interest. *Over one hundred parties, including mineral interest owners from adjacent properties, royalty interest owners, and claimants through such properties . . . filed suits against Apache and El Paso seeking damages alleging that Apache and El Paso's wrongful acts caused the blowout.* All of these cases have been consolidated by the trial court.

Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556 (Tex. 1990) (dealing with discovery issues) (emphasis added).

Apache leaves out of the equation the millions of dollars of actual damages suffered by over one hundred other parties. Apache effectuated settlements with all but a few small royalty owners (the Moore Group) and now argues that the actual damages of only these royalty owners who stayed the course do not justify a large award of punitive damages. Under these circumstances, it would be perverse to allow a company whose gross negligence caused a gas well blowout of the magnitude here involved to evade an award of punitive damages on grounds that the actual damages are too small.[11]

4. The Texas Court of Appeals used a proper standard of review in connection with Apache's excessiveness claim.

Apache argues that the Texas Court of Appeals used a "highly constricted standard of review" when it rejected Apache's excessiveness claim. Pet. 9, fn. 10. However, Apache fails to mention that the Court of Appeals specifically held that the award of punitive damages was not excessive under the circumstances:

> Depicted in six sub-points, Apache contends by its fourth point of error that even if exemplary damages are justified, the trial court erred in failing to remit the excessive amount awarded. *We have previously determined the award was not excessive, pretermitting our address of this issue.*

Pet. App. 32a (emphasis added).

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[11] This is particularly true when a punitive damages award of $1,500,000 constitutes roughly 1/3 of 1% of Apache's net worth. S.F. 3948.

The fact is that even a casual reading of the decision of the Texas Court of Appeals reveals that it found that (i) the award of punitive damages to the Moore Group was not excessive under the circumstances, and (ii) Apache's point of error regarding the trial court's failure to remit was thus moot. Pet. App. 32a. The appellate court concluded:

> The evidence previously outlined is legally sufficient for the jury to have found exemplary damages. Moreover, we have determined that this evidence was sufficient to support the award and the award was not excessive or unreasonable under the circumstances.

Pet. App. 32a. In short, there is not a shred of evidence to indicate that the Texas Court of Appeals used a constricted standard of review.[12]

5. The degree of reprehensibility of the misconduct justifies the punitive damages award.

Apache suggests that the punitive damages award bears no relationship to the degree of reprehensibility of the misconduct. Pet. 12-15. Apache's argument is filled with factual inaccuracies and material omissions, and is legally flawed.

Apache first contends that "the conduct for which Apache is being mulcted must be placed on the low end of the reprehensibility spectrum" and that Apache has been fined "for no more than 'gross negligence'." Pet. 12.

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[12] In fact, the appellate court did reduce the punitive damages awarded to the Moore Group from $1,687,000 to $1,500,000.

However, under Texas law, gross negligence includes the following two elements:

> (1) viewed objectively from the standpoint of the actor, the act or omission must involve an *extreme degree of risk*, considering the probability and magnitude of the potential harm to others, and
>
> (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in *conscious indifference to the rights, safety, or welfare of others.*

Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 23 (Tex. 1994) (emphasis added). As so defined, gross negligence is not "on the low end of the reprehensibility spectrum." The jury found Apache guilty of gross negligence, and the Texas Court of Appeals affirmed that finding after an extensive review of the evidence.

Furthermore, there is no doubt that the Due Process Clause allows the imposition of punitive damages upon a finding of gross negligence. As the Tenth Circuit recently stated:

> We conclude from these decisions that the Due Process Clause permits imposing damages if . . . the defendant's tortious conduct was sufficiently "egregious" to support an award of punitive damages. . . . The award of punitive damages against TIC did not offend due process. . . . It knew that danger was imminent. . . . Yet it chose to do nothing.

Patton v. TIC United Corp., 1996 U.S. LEXIS 2415, pp. 21, 23-25 (10th Cir. February 16, 1996). The language of the

Patton case echoes that of the Texas Court of Appeals in this case:

> Stated differently, Apache made a decision, in the face of impending harm, not to care about the consequences of its actions which might have, and ultimately did, lead to that harm.

Pet. App. 22a.

Apache next contends that punitive damages are inappropriate because the Key 1-11 well was drilled in accordance with industry custom. The jury decisively rejected this argument, and the Texas appellate courts agreed.[13] As shown by the evidence recounted in the Statement of the Case, *supra*, and in the Texas Court of Appeals' decision (Pet. App. 1a *et seq.*), this case presents a truly unique and egregious set of facts, which are completely at odds with industry custom. Prostitutes, cocaine and alcohol on the well site while the well was being drilled, the failure to run logs to determine whether the all important $7^5/_8$ intermediate casing had been weakened as a result of drilling cement out of it, the failure to inspect the integrity of that casing prior to its use in the well, the failure to monitor the Axelson pressure relief system to detect that its nitrogen power supply was empty and that the system was not even hooked up to its power source prior to the blowout, were not industry custom even in the most excessive years of the Texas "oil boom", which is when the Key well was drilled.[14] No responsible oil company operated in such a manner.

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[13] Even the newly constituted, tort reform-minded Texas Supreme Court declined to hear the case.

[14] As evidence that Apache followed industry custom, Apache represents to the Court that it "obtained the best

Apache then makes a bizarre argument. Noting correctly that there was conflicting expert testimony at trial, Apache urges that the very existence of such conflicting testimony precludes an award of punitive damages. Apache cites three cases in support of this proposition. Pet. 14, fn. 14. However, even a casual reading of these decisions reveals that they involve special situations not present here.

In *Satcher v. Honda Motor Co.*, 52 F.3d 1311 (5th Cir. 1995), a case dealing with whether motorcycles should be equipped with leg guards, the Fifth Circuit noted that under Mississippi law, punitive damages can be awarded only in "extreme cases." *Id.* at 1316. The court then summarized the evidence presented to the jury:

> (1) [T]here is a genuine dispute in the scientific community as to whether leg guards do more harm than good, (2) no government or agency thereof has ever required them, (3) no independent testing or professional organization has ever recommended them, (4) one of the original researchers on the problem who worked with two of the plaintiff's experts disagrees with them, (5) the industry as a whole categorically rejects the need for leg guards, and (6) Honda's

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available testing for the production *tubing* . . . and *contracted for* the standard tests for the casing. . . . " Pet. 13. However, it was the *casing* that ruptured, not the tubing. Further, while Apache may have "contracted for" the standard tests for the casing, those tests were not performed. S.F. 381-382. This is not surprising, since the company that Apache contracted with to test the casing had a known history of providing Apache employees with kickbacks (P. Ex. 65; S.F. 1587-1588) and in fact provided kickbacks, drugs and prostitutes to the Key well prior to the blowout. S.F. 130; 152; 157-158; 182-183.

> own testing on their use reached no definitive conclusions.

Id. at 1317. On this record, the Fifth Circuit held that no reasonable jury could find that this was an "extreme case" that merited punitive damages. The difference between the evidence in *Satcher* and the evidence in the present case is obvious. The Key 1-11 well was not drilled, completed, or monitored in accordance with industry standards, or even common sense.

In *AMPAT/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035 (7th Cir. 1989), the Seventh Circuit held that the trial court had not abused its discretion by setting aside a jury award of punitive damages. The court noted that Illinois law only allows punitive damages in very limited situations, *e.g.*, gross fraud, breach of trust, or other extraordinary or exceptional circumstances clearly showing malice and willfulness. *Id.* at 1043. The *AMPAT* case involved defective Tapcons, which are carbon steel screws used to anchor window frames to walls. The evidence showed that the safety hazard from the defective Tapcons was small; in particular, no window frames ever fell out of the building in question. The court concluded:

> This was a close case on liability . . . , and it makes sense to scale down an award of damages in recognition of a distinct possibility that the judgment may be premised on a mistaken finding of liability.

Id. at 1044. Apache no doubt wishes that this case were a "close case on liability", but no unbiased person who examines the evidence would ever come away believing that the judgment in this case "may be premised on a mistaken finding of liability."

Finally, *Loitz v. Remington Arms Co.*, 563 N.E.2d 397 (Ill. 1990), involved the safety and suitability of the metal used in Remington's Model 1100 shotgun barrel. After noting that Illinois allows punitive damages only in cases of willful and wanton misconduct, or perhaps flagrant indifference to public safety, the Illinois Supreme Court reversed an award of punitive damages that had been based upon failure to warn, because "[t]he plaintiff did not present any evidence that would cast doubt on Remington's good faith. . . . " *Id.* at 407. The facts of *Loitz* are light-years away from the present case, where once again, as the Texas Court of Appeals stated, "Apache made a decision, in the face of impending harm, not to care about the consequences of its actions which might have, and ultimately did, lead to that harm." Pet. App. 22a.

It has never been the law that the existence of conflicting expert testimony prohibits *per se* the imposition of punitive damages. None of the three cases cited by Apache supports that proposition.

Apache concludes the portion of its argument on the relationship of the punitive damages award to the reprehensibility of the misconduct with several misstatements, such as this case "involved an isolated instance of inattentiveness and/or bad judgment by low-level employees" and "there can be no question that management neither participated in that scheme nor approved it once it learned of it." Pet. 15. As discussed above, these statements are simply untrue.

6. The punitive damages award in this case is needed for proper deterrence.

Apache's final argument is that because Apache was the principal victim of its own gross negligence, because Apache "and Meridian"[15] lost millions of dollars worth of gas, and because Apache suffered "mammoth losses" as a result of the blowout, it should be exempt from punitive damages. Pet. 16. Not surprisingly, Apache cites no supporting authority for its argument. The severity of financial loss suffered as the result of one's own gross negligence has never been a defense to punitive damages, nor should it be. Moreover, Apache fails to mention that its pretrial settlements with parties it sued other than Axelson, and Apache's settlement of its multi-million dollar claim against Axelson after the *voir dire* examination of the jury panel, significantly reduced its claimed losses. At any rate, as noted earlier, the evidence showed that even a year and a half after the blowout, Apache had neither realistic policies to prevent the types of activities complained about, nor minimum safety and training standards. Apache conducted an internal investigation and began to operate more responsibly only after it had been repeatedly sued, in an effort to cast itself in the best possible light for purposes of litigation.

* * *

In light of these considerations, this Court should deny Apache's Petition regardless of how the *BMW* case is decided. If the Court finds the punitive damages in *BMW* to be excessive, and remands this case for further

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[15] Apache's reference to Meridian is puzzling, since Meridian is not a party to this proceeding.

consideration in light of *BMW*, the uniquely egregious facts of this case may well insure its swift return to this Court. If, on the other hand, the Court does not reach the excessiveness issue in *BMW*, this case is simply not an appropriate vehicle to address the boundaries of the Due Process Clause, not only because of its unique facts, but also because the punitive damages award occurred under a set of common law rules no longer used in Texas.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

CHAPTER 41. EXEMPLARY DAMAGES

§ 41.001. Definitions

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of exemplary damages. In a cause of action in which a party seeks recovery of exemplary damages related to injury of another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of exemplary damages.

(2) "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

(3) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief with respect to exemplary damages.

(4) "Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

(5) "Exemplary damages" means any damages awarded as a penalty or by way of punishment. "Exemplary damages" includes punitive damages.

(6) "Fraud" means fraud other than constructive fraud.

(7) "Malice" means:

(A) a specific intent by the defendant to cause substantial injury to the claimant; or

(B) an act or omission:

(i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

§ 41.002. Applicability

(a) This chapter applies to any action in which a claimant seeks exemplary damages relating to a cause of action.

(b) This chapter establishes the maximum exemplary damages that may be awarded in an action subject to this chapter, including an action for which exemplary damages are awarded under another law of this state. This chapter does not apply to the extent another law establishes a lower maximum amount of exemplary damages for a particular claim.

(b) This chapter does not apply to:

(1) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) except as specifically provided in Section 17.50 of that Act;

(2) an action brought under Chapter 21, Insurance Code;

(3) an action brought under the workers' compensation laws of this state (Title 5, Labor Code);

(4) an action to recover exemplary damages against an employer by the employee's beneficiaries in a death action arising out of the course and scope of employment where the employer is a subscriber under the workers' compensation laws of this state (Title 5, Labor Code);

(5) an action brought under Chapter 246, Acts of the 63rd Legislature, Regular Session, 1973, Home Solicitation Transactions (Article 5069-13.01 et seq., Vernon's Texas Civil Statutes);

(6) an action brought under Chapter 547, Acts of the 63rd Legislature, Regular Session, 1973, Debt Collection Practices (Article 5069-11.01 et seq., Vernon's Texas Civil Statutes);

(7) an action brought under Chapter 54, 91, or 92, Property Code;

(8) an action brought under the Texas Manufactured Housing Standards Act (Article 5221f, Vernon's Texas Civil Statutes);

(9) an action brought under the Texas Motor Vehicle Commission Code (Article 4413(36), Vernon's Texas Civil Statutes);

(10) an action brought under Chapter 132, Education Code;

(11) an action brought under Section 9.507 or Section 27.01, Business & Commerce Code;

(12) an action brought under Chapter 36, Family Code;

(13) an action brought under the Health Spa Act (Article 5221l, Vernon's Texas Civil Statutes);

(14) an action brought under the Business Opportunity Act (Article 5069-16.01 et seq., Vernon's Texas Civil Statutes); or

(15) an action brought under Chapter 221, Property Code.

(c) Except as provided by Subsections (b) and (d), in an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

(d) Notwithstanding any provision to the contrary, this chapter does not apply to Section 15.21, Business & Commerce Code (Texas Free Enterprise and Antitrust Act of 1983), an action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) except as specifically provided in Section 17.50 of that Act, or an action brought under Chapter 21, Insurance Code.

§ 41.003. Standards for Recovery of Exemplary Damages

(a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect

to which the claimant seeks recovery of exemplary damages results from:

(1) fraud;

(2) malice; or

(3) wilful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body, under a statute enacted pursuant to Section 26, Article XVI, Texas Constitution. In such cases, the definition of "gross neglect" in the instruction submitted to the jury shall be the definition stated in Section 41.001(7)(B).

(b) The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.

(c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.

§ 41.004. Factors Precluding Recovery

(a) Except as provided by Subsection (b), exemplary damages may be awarded only if damages other than nominal damages are awarded.

(b) A claimant may recover exemplary damages, even if only nominal damages are awarded, if the claimant establishes by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from malice as defined in Section 41.001(7)(A). Exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute.

§ 41.005. Harm Resulting From Criminal act

(a) In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another.

(b) The exemption provided by Subsection (a) does not apply if:

(1) the criminal act was committed by an employee of the defendant;

(2) the defendant is criminally responsible as a party to the criminal act under the provisions of Chapter 7, Penal Code;

(3) the criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a common nuisance under the provisions of Chapter 125, Civil Practice and Remedies Code, and had not made reasonable attempts to abate the nuisance; or

(4) the criminal act resulted from the defendant's intentional or knowing violation of a statutory duty under Subchapter D, Chapter 92, Property Code, and the criminal act occurred after the statutory deadline for compliance with that duty.

(c) In an action arising out of a criminal act committed by an employee, the employer may be liable for punitive damages but only if:

(1) the principal authorized the doing and the manner of the act;

(2) the agent was unfit and the principal acted with malice in employing or retaining him;

(3) the agent was employed in a managerial capacity and was acting in the scope of employment; or

(4) the employer or a manager of the employer ratified or approved the act.

§ 41.006. Award Specific to Defendant

In any action in which there are two or more defendants an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.

§ 41.007. Prejudgment Interest

Prejudgment interest may not be assessed or recovered on an award of exemplary damages.

§ 41.008. Limitation on Amount of Recovery

(a) In an action in which a claimant seeks recovery of exemplary damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of economic damages; plus

(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or

(2) $200,000.

(c) Subsection (b) does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:

(1) Section 19.02 (murder);

(2) Section 19.03 (capital murder);

(3) Section 20.04 (aggravated kidnapping);

(4) Section 22.02 (aggravated assault);

(5) Section 22.011 (sexual assault);

(6) Section 22.021 (aggravated sexual assault);

(7) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(8) Section 32.21 (forgery);

(9) Section 32.43 (commercial bribery);

(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);

(11) Section 32.46 (securing execution of document of deception);

(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);

(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;

(14) Section 49.07 (intoxication assault); or

(15) Section 49.08 (intoxication manslaughter).

§ 41.009. Bifurcated Trial

(a) On motion by a defendant, the court shall provide for a bifurcated trial under this section. A motion under this subsection shall be made prior to voir dire examination of the jury or at a time specified by a pretrial court order issued under Rule 166, Texas Rules of Civil Procedure.

(b) In an action with more than one defendant, the court shall provide for a bifurcated trial on motion of any defendant.

(c) In the first phase of a bifurcated trial, the trier of fact shall determine:

(1) liability for compensatory and exemplary damages; and

(2) the amount of compensatory damages.

(d) If liability for exemplary damages is established during the first phase of a bifurcated trial, the trier of fact shall, in the second phase of the trial, determine the amount of exemplary damages to be awarded, if any.

§ 41.010. Considerations in Making Award

(a) Before making an award of exemplary damages, the trier of fact shall consider the definition and purposes of exemplary damages as provided by Section 41.001.

(b) The determination of whether to award exemplary damages and the amount of exemplary damages to be awarded is within the discretion of the trier of fact.

§ 41.011. Evidence Relating to Amount of Exemplary Damages

(a) In determining the amount of exemplary damages, the trier of fact shall consider evidence if any, relating to:

(1) the nature of the wrong;

(2) the character of the conduct involved;

(3) the degree of culpability of the wrongdoer;

(4) the situation and sensibilities of the parties concerned;

(5) the extent to which such conduct offends a public sense of justice and propriety; and

(6) the net worth of the defendant.

(b) Evidence that is relevant only to the amount of exemplary damages that may be awarded is not admissible during the first phase of a bifurcated trial.

§ 41.012. Jury Instructions

In a trial to a jury, the court shall instruct the jury with regard to Sections 41.001, 41.003, 41.010, and 41.011.

§ 41.013. Judicial Review of Award

(a) Except as provided for in Subsection (b), an appellate court that reviews the evidence with respect to a finding by a trier of fact concerning liability for exemplary damages or with respect to the amount of exemplary damages awarded shall state, in a written opinion, the court's reasons for upholding or disturbing the finding or award. The written opinion shall address the evidence or lack of evidence with specificity, as it relates to the liability for or amount of exemplary damages, in light of the requirements of this chapter.

(b) This section does not apply to the supreme court with respect to its consideration of an application for writ of error.